

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2003

To be argued by
FRANK H. WOHL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2003

JACK NATHAN,

Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

RESPONDENT-APPELLEE'S BRIEF

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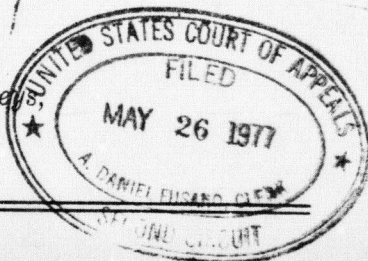


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RESPONDENT-APPELLEE'S BRIEF

Preliminary Statement

Jack Nathan appeals from an order filed in the United States District Court for the Southern District of New York on December 28, 1976 by the Honorable Dudley B. Bonsal, United States District Judge, denying Nathan's post-conviction motion, pursuant to 28 U.S.C. § 2255. In October 1975, Judge Bonsal presided over Nathan's six-day jury trial, which resulted in Nathan's conviction on four counts of tax evasion in violation of 26 U.S.C. § 7201. On December 8, 1975, Judge Bonsal sentenced Nathan to nine months' imprisonment and a fine of \$40,000. On June 16, 1976, this Court affirmed Nathan's conviction. That opinion appears at 536 F.2d 988.

On October 7, 1976, Nathan filed the present motion pursuant to 28 U.S.C. § 2255 raising for the first time his claim that his trial attorney had a conflict of interest because he also represented a potential (but un-called) witness, and seeking an adjournment of his then

imminent surrender. On October 12, 1976, Judge Bonsal denied Nathan's motion for an adjournment of surrender. On October 13, this Court orally affirmed that ruling on the ground that certiorari was then pending in the Supreme Court depriving this Court of jurisdiction, but gave Nathan an interim stay to permit him to seek relief in the Supreme Court. Justice Marshall thereafter stayed Nathan's surrender until his claim could be considered by the full court. On November 1, 1976, the Supreme Court denied Nathan's petition for certiorari, as well as his motion to vacate this Court's denial of his motion for a stay of surrender. Nathan then moved in this Court for another stay of surrender, which was orally denied on November 9, 1976. Nathan surrendered on November 10, 1976.

Judge Bonsal conducted a hearing on Nathan's § 2255 motion on December 1, 1976. On December 28, 1976, he denied the motion finding that at his trial Nathan had knowingly waived the conflict of interest claim and that at the § 2255 hearing Nathan had failed to establish any real conflict of interest or specific instance of prejudice.

Statement of Facts

A. Nathan's tax violations

Nathan was convicted in October 1975 of four counts charging evasion of his personal income taxes for the years 1967 through 1970 in violation of 26 U.S.C. § 7201. The scheme by which Nathan accomplished these violations was, as this Court has already noted, "simple and direct in its conception." 536 F.2d at 990. As the owner and operator of a bill collection agency, Nathan, Nathan & Nathan, Ltd., which specialized in collecting bills due hotels, Nathan routinely remitted to his client hotels, after deducting his commission, funds he collected on their behalf. These "refunds", as they were referred to in the company's books, did not constitute taxable in-

come to Nathan or his company since he was acting merely as a conduit for the payment of the debtor to the hotel. (Tr. 197-99).^{*} Nathan's violations consisted of a two-part scheme by which these refunds, which were all deducted from the company's taxable income, were fraudulently overstated.

First, the calculations of refunds included many checks allegedly written by Nathan's company that the payee hotels never cashed (Tr. 447-57; GX 338). Even after these checks remained outstanding for several years, Nathan insisted that his accountants leave them on the books as refunds rather than write them off. Nathan had a dispute on this issue in early 1966 with his accountant, Allen Edwards, who told Nathan that in order to conform to the tax laws it would be necessary to reverse such entries in the corporate books, adding the amounts reflected by the stale outstanding check to income. Their inability to resolve this dispute led Nathan in 1966 to discharge Edwards and hire Sanford Katz as his accountant. (Tr. 22-29, 32-34, 76-78). Katz did not insist, as Edwards had, that those entries be corrected before preparing Nathan's tax returns. (Tr. 171-72). By 1971 the company's books showed as refunds \$49,702.17, which in fact consisted of stale outstanding checks issued between 1963 and 1970. (GXs 338, 440-41, Tr. 447-56).

The second part of Nathan's scheme consisted of siphoning money out of the corporation by causing checks to be written to client hotels and shown on the company's books as refunds, although Nathan in fact took these

^{*} "Tr." refers to pages of the trial transcript; "a." refers to Nathan's appendix; "H." refers to the § 2255 hearing; "GX" refers to Government Exhibits at the trial; and "Br." to appellant's brief on this appeal.

checks to the client hotels and cashed them. (Tr. 436-41, 457; GX 336). Between 1967 and 1970, Nathan drew and cashed over 100 such checks in an aggregate amount of \$36,120 (GXs 31-145, 336). None of Nathan's accountants were informed that Nathan was cashing these checks instead of remitting them to his client hotels, and consequently all of them were incorrectly treated as refunds to be deducted from the corporation's taxable profits. Nathan reported none of these amounts as income on his personal tax returns.

The entire scheme resulted in an understatement by Nathan of over \$60,000 on his personal tax returns for the four years.*

B. Nathan's representation

On the first day of trial, Nathan's counsel, Louis Bender, Esq., notified the Court that he also represented Joseph Katzman, another accountant who had worked for Nathan after the Internal Revenue Service had begun to investigate Nathan, and that although the Government was not expected to call Katzman as a witness in its case in chief, he was a possible Government rebuttal witness. Bender proposed that any potential conflict of interest

* Since Nathan, Nathan & Nathan filed tax returns as a Subchapter S corporation for the years 1967 and 1968, the corporation itself paid no tax, but Nathan, as the corporation's sole shareholder, was taxed on the corporation's profits. The understatement of the corporation's gross receipts and profits therefore resulted in an understatement of Nathan's taxable income. Since Nathan, Nathan & Nathan filed tax returns as a regular corporation for the years 1969 and 1970, understatement of the corporation's profits resulted in a corporate tax deficiency, and failure of Nathan to report as income the cashed checks, which were dividends to him, also resulted in a personal income tax deficiency. (Tr. 473-75).

problem could be avoided by arranging for Judge Richard Baltimore, who was also sitting at the defense table, to cross-examine Katzman in the event that he testified as a Government witness. Noting that he had previously explained the situation to Nathan, Bender specifically referred to his inability to cross-examine his own client and said that Nathan "could very well feel that [by] my representing Katzman in a different case, he is getting divided loyalty." (6a-7a). Nathan, the owner of several corporations as well as a seat on the New York Produce Exchange (Tr. 169, 337, 345, 377), consented to this arrangement:

Your Honor, I have complete confidence in Mr. Bender and Judge Baltimore. Whatever they do, I am one hundred percent in accord.

The Court: And if they say to you in doing this you might be waiving the Sixth Amendment privileges, is that agreeable to you?

The Defendant: I will do anything they say Your Honor.

* * * * *

Mr. Bender: . . . But I think we should get from Mr. Nathan, with all due respect to Mr. Nathan's answers, I think we should get from Mr. Nathan an expressed statement, not that he is following Judge Baltimore and me blindly, but that he understands the situation, that he agrees that he wants me——

* * * * *

The Court: . . . But the point is totally apart from your reliance on Mr. Bender and Mr. Baltimore, I want to ask you do you understand the situation?

The Defendant: I do.

The Court: Regardless of your reliance on them you do waive any right that you may have, is that correct?

The Defendant: Yes, Your Honor. (7a-9a)

The trial continued for five more days. Neither side called Mr. Katzman,* and the defense put on no witnesses. Nathan was convicted on Counts One through Four, and the jury hung on Counts Five through Eight.

Shortly after the trial new counsel, Nathan Lewin, Jamie S. Gorelick and Miller, Cassidy, Larroca and Lewin, Esqs., appeared for Nathan and filed voluminous post-trial motions. They made no claim of conflict of interest on the part of trial defense counsel. On De-

*Katzman was referred to from time to time as the accountant whom Nathan had hired around 1970 after the Internal Revenue Service had commenced an investigation into Nathan's tax affairs. (Tr. 229-33, 255-58). The proof was clear, however, that Katzman had had nothing to do with Nathan's 1967 and 1968 tax returns, which constituted the basis for two of the counts on which he was convicted, since they were prepared and filed before Nathan engaged Katzman. Katzman did participate in the preparation of Nathan's 1969 and 1970 returns filed in 1971, although the returns were in fact finally prepared by government witness Stanford Katz, Nathan's primary accountant during the relevant years. The 1969 and 1970 returns, at Katzman's suggestion, included proper adjustments for several years' worth of stale outstanding checks. (Tr. 233, 307-11). Consequently, in Counts Three and Four, based on the 1969 and 1970 returns, the Government charged only that Nathan concealed income by surreptitiously cashing checks at the client hotels. In these counts the Government did not charge Nathan with use of the stale checks as was charged in the counts concerning 1967 and 1968. (Tr. 468-72). There was no proof that Katzman ever knew of or had anything to do with Nathan's check cashing scheme on which Counts Three and Four were based.

ember 8, 1975, Judge Bonsal denied those motions and sentenced Nathan to concurrent terms of nine months' imprisonment and fines of \$10,000 on each of the four counts on which he had been convicted.

On June 16, 1976, this Court affirmed Nathan's conviction, rejecting Nathan's attacks on the sufficiency of the evidence, and the District Court's evidentiary rulings and charge to the jury. Nathan was represented on that appeal by the Miller, Cassidy firm.

C. Nathan's § 2255 Petition

On October 7, 1976, shortly before Nathan was scheduled to begin serving his sentence, a third battery of attorneys, Thal & Youtt, Esqs., filed a motion, pursuant to 28 U.S.C. § 2255, urging for the first time that Nathan had been denied effective assistance of counsel at his trial because of Bender's alleged conflict of interest.

On December 1, 1976, Judge Bonsal held a hearing concerning Nathan's allegation of a conflict of interest. At that hearing Bender testified that shortly before the trial he learned that another client of his, Joseph Katzman, was the same Joseph Katzman who had worked for Nathan. (H. 38, 40). He disclosed this fact to Nathan, who agreed to Judge Baltimore's cross-examining Katzman if Katzman appeared as a government witness. (H. 41). Bender also testified that in the early stages of his representation of Nathan, he had thought Katzman might be a defense witness for Nathan (H. 9), but that he later concluded that Katzman's appearance as a witness would be "disastrous" for Nathan because of a collateral dispute between Nathan and Katzman about records that were used to change Nathan, Nathan & Nathan from a Subchapter S company to a regular corporation.*

* Nathan claimed that these records had been backdated at Katzman's suggestion. Katzman apparently denied this. (H. 27-28).

(H. 16-17). Bender also testified that in his opinion there were no other witnesses available who would have advanced Nathan's defense.* (H. 56).

Bender also testified that prior to the trial Nathan had said he wanted to testify, but that Bender, Judge Baltimore, Sandor Frankel (Bender's associate) and Theodore Mate (Nathan's accounting consultant) all agreed that Nathan should not testify. (H. 46). Based on that advice, Nathan made the decision not to testify. (H. 52). Bender testified that his primary reasons for advising Nathan against testifying were (1) that Nathan would make a very poor witness because of his demeanor and his unwillingness to answer questions directly, (2) the danger of opening the door to the dispute between Nathan and Katzman about records that were used to change Nathan, Nathan & Nathan to a regular corporation, and (3) the danger that Beatrice Carrasquillo, Nathan's bookkeeper, would be called as a rebuttal witness concerning another matter harmful to Nathan.** (H. 46-50). Consequently, Bender decided that the wisest course from Nathan's point of view was to put on no witnesses. Bender testified that his representation of Katzman did not enter into his assessment of the best trial strategy for Nathan. (H. 29,36,58).

Nathan testified that he wanted to testify in his own defense and that he never decided otherwise but that

* Bender considered re-calling Sanford Katz, Nathan's accountant, who had testified as a government witness, but decided against it for tactical reasons. (H. 57). He also concluded that Theodore Mate, Nathan's accounting consultant, who sat at the defense table throughout the trial, could not help Nathan by his testimony. (H. 17). Nathan was unable to produce any of his employees or character witnesses who would be effective witnesses. (H. 54, 57).

** Nathan's counsel successfully objected to any disclosure of the details of this matter. (H. 46-50).

Bender never advised him of any legal right to testify (H. 67, 89, 90, 92). Nathan also testified that he wanted to call defense witnesses such as Katzman and Mate (H. 64-65, 74, 87),* and that he wanted to adjourn the trial. Nathan admitted that he never brought any of these matters to the Court's attention. He claimed that Bender told him that he should not try to be his own lawyer and that Judge Bonsal would be angry with him and might lock him up for "raising a rumpus" in court. (H. 66, 67, 70-71). Nathan's counsel at the § 2255 hearing never asked Bender, who testified prior to Nathan, whether Bender had in fact made these threats.

Nathan also testified that he had not understood from a discussion in Bender's office on the night before the trial began, or the robing room conference on the first day of trial that Bender represented Katzman as a client in an Internal Revenue Service matter. (H. 68, 70, 95-98).

Judge Baltimore testified that he had attended about 40% of the trial as Nathan's friend.** (H. 110, 118). He

* Nathan testified that the testimony of Katzman and Mate would have "confirmed" that Katzman was in charge of Nathan's accounting work. (H. 87). Nathan admitted that he had not met Katzman until 1970 or 1971. (H. 83). Although Nathan claimed that Katzman was in charge of filing his tax returns, the 1967 and 1968 returns show that they were filed prior to the time Nathan met Katzman. (GX 6A, 6B).

** Bender testified that Nathan had wanted Judge Baltimore to be co-counsel in the case. Bender resisted this arrangement. Prior to the trial, Judge Baltimore told Bender that because of his position as a judge he could not appear as co-counsel but that he wanted to be "associated with me in whatever way I felt I could help him and in whatever way he felt he could help Mr. Nathan." (H. 43). Before and during the trial, Bender continued to have "many" conversations with Judge Baltimore

[Footnote continued on following page]

also testified that he did not fully understand that Bender represented Katzman as a client (H. 111-12, 117-18),* although he agreed to cross-examine Katzman if Katzman appeared as a witness (H. 111, 129, 130).** Judge Baltimore had agreed that Nathan should not testify because he would make a poor witness. (H. 122, 123, 127). Judge Baltimore also testified that Nathan asked Bender for an adjournment. (Hr. 120).

By a memorandum decision filed December 28, 1976, Judge Bonsal denied Nathan's petition on the grounds that in the robing room conference Nathan had know-

on such subjects as "trial strategy and strategy of witnesses." (H. 43-45). Judge Baltimore testified that he attended only 40% of the trial and that he did not attend the trial after the government rested except that he was present during the jury's deliberations. (H. 125). In particular, he testified that he was not present during the summations. (H. 124). Although the trial record generally does not reflect who was present on each day of the trial, it does indicate that Judge Baltimore was present during the summations, which occurred on the same day the defense rested. (Tr. 574, 647).

* Judge Baltimore testified that his impression from a meeting in Bender's office the night before the first day of the trial was that Bender represented a client of Katzman's. (H. 111-12). At one point Judge Baltimore seemed to testify that he got the same impression at the robing room conference on the next day. (H. 117). After being confronted with the transcript of that conference, however (H. 117-18), Judge Baltimore testified that he had understood that Bender's explanation at the robing room conference was "materially different" from what he had understood the night before. He said that he decided not to bring the discrepancy to anyone's attention but instead to follow a course of action (which he did not entirely explain), that he thought might cause a mistrial if Katzman testified. (H. 129).

** Nathan testified that when Bender told Nathan in Bender's office that he also represented Katzman, Judge Baltimore said that Bender would have to return Nathan's fee. (H. 68-69). Judge Baltimore testified that he had not participated in any discussions concerning any legal fees. (H. 127).

ingly waived any objection to the possible conflict of interest and that Nathan had "failed to establish a real conflict or a specific instance of actual prejudice." Judge Bonsal also found that, based on his observation of Nathan's testimony at the § 2255, hearing, the decision that he not testify at the trial was "a wise decision" and that no evidence had been produced indicating that any other witnesses should have been called by the defense. (152a-44a).

ARGUMENT

Nathan Was Not Denied Effective Assistance Of Counsel By Virtue Of An Alleged Conflict Of Interest On The Part Of His Defense Attorney.*

A. No Real Conflict of Interest Between Nathan's Counsel's Clients Appeared at Nathan's Trial.

Taken as a whole, the record of Nathan's trial and the hearing on his § 2255 petition demonstrate that the conflict of interest between Nathan and Katzman is a

* In view of the remarkably frivolous nature of Nathan's claims, this Court need not reach the essentially procedural issue of whether Nathan could even be heard on the § 2255 motion. As noted in the Statement of Facts, Nathan was represented in his post-trial motions and on his appeal to this Court by attorneys wholly independent of Mr. Bender; nonetheless, he chose not to present his claim of conflict on either of those occasions, although the record upon which he now bases his argument existed then. Petitions for collateral relief may not substitute for normal appellate review. *United States v. Wright*, 524 F.2d 1100 (2d Cir. 1975); *United States v. Coke*, 404 F.2d 836 (2d Cir. 1968); *United States v. Sobell*, 314 F.2d 314 (2d Cir.), cert. denied, 374 U.S. 857 (1963). See generally, *United States v. Davis*, 417 U.S. 333, 345-46 (1974); *Sunal v. Large*, 332 U.S. 174 (1947); *United States v. Losehiaro*, 531 F.2d 659 (2d Cir. 1976); *United States v. Travers*, 514 F.2d 1171, 1176 (2d Cir. 1974). This principle has been found applicable to constitutional as well as statutory claims. *Williams v. United States*, 334 F. Supp. 669 (S.D.N.Y.) (Weinfeld, J.), aff'd 463 F.2d 1183 (2d Cir.), cert. denied, 409 U.S. 967 (1972).

figment of Nathan's imagination. Nathan and Katzman were not co-defendants; nor was Katzman claimed to have been a co-conspirator in Nathan's misconduct. The facts here therefore reveal no true conflict of interest such as might occur when one attorney represents several co-defendants or co-conspirators. See, *Abraham v. United States*, 549 F.2d 236 (2d Cir. 1977); *United States v. Carrigan*, 543 F.2d 1053 (2d Cir. 1976); *United States v. DeBerry*, 487 F.2d 448 (2d Cir. 1973). Nor was defense counsel forced to cross-examine another of his own clients as in *United States v. Alberti*, 470 F.2d 878 (2d Cir. 1972), cert. denied, 411 U.S. 919 (1973) and *United States ex rel. Williamson v. LaVallee*, 282 F. Supp. 968 (E.D.N.Y. 1968), since Katzman was never called as a witness.

Indeed, an examination of the circumstances surrounding Nathan's tax violations reveals no conflict between Nathan and Katzman concerning those events. The record is clear that Nathan's 1967 and 1968 tax returns, on which Counts 1 and 2 were based, were prepared, signed and filed with the Internal Revenue Service prior to Nathan's meeting Katzman in 1970 or 1971. (GXs 6A, 6B; H. 83). As to Nathan's 1969 and 1970 tax returns, filed delinquent after Nathan engaged Katzman, the proof is equally clear that Katzman had nothing to do with Nathan's check cashing scheme that constituted the sole basis for the charges contained in Counts 3 and 4. (Tr. 468-72). In short, there has never been any allegation that Katzman was responsible for Nathan's tax violations. Consequently, there was no true conflict between Nathan and Katzman concerning the charges on which Nathan was tried and convicted.*

* The only area of disagreement between Nathan and Katzman suggested in the record relates to how Nathan's corporation was changed from a Subchapter S small business corporation to a regular corporation. This issue was not raised by the charges against Nathan, was hardly mentioned at the trial, and therefore does not constitute a real conflict of interest rising to the level of a deprivation of Nathan's Sixth Amendment rights.

Furthermore, even the potential conflict between Nathan and Katzman was removed when it was agreed among all parties and the Court that if Katzman appeared as a witness, Judge Baltimore would conduct the cross-examination. Since Judge Baltimore had never represented Katzman and was a personal friend of Nathan rather than of Bender, he clearly would have been able to conduct a vigorous cross-examination unencumbered by any claims by Katzman that the cross-examination was based on privileged material or claims by Nathan that the cross-examiner's zeal was diluted by loyalty to Katzman.

B. Nathan was not Prejudiced by his Attorney's Representation of Katzman in an Entirely Unrelated Matter

The cases are clear that even a demonstrated conflict of interest will not support a claim of denial of effective assistance of counsel unless the record reveals "some specific instance of prejudice." *United States v. Carri-gan, supra*, 543 F.2d 1053; *United States v. Lovano*, 420 F.2d 769 (2d Cir.), *cert. denied*, 397 U.S. 1071 (1970).

Nathan asserts two allegations of prejudice. He claims that Bender's representation of Katzman was responsible for Nathan's failure to take the stand and for the decision not to call other defense witnesses. An analysis of the record reveals, however, that these claims are without merit, as Judge Bonsal explicitly found.

The evidence adduced at the § 2255 hearing established that these defense decisions were based entirely upon an evaluation of Nathan's interests. It is undisputed that all lawyers in the defense camp—Bender, his associate, and Judge Baltimore—as well as Theodore Mate, the consulting accountant, agreed that Nathan should not testify because of the poor impression he

would be likely to make as a witness. Judge Bonsal, after observing Nathan testify at the § 2255 hearing, referred to this as a "wise decision." * In deciding that Nathan should not testify, Bender was also concerned that Nathan's testimony would open the door to additional damaging areas, such as Nathan's claim that Katzman suggested backdating documents used by Nathan in connection with certain of his corporate tax returns, a suggestion that Nathan apparently admits he went along with. (H. 27-29).

This Court rejected a contention similar to that advanced by Nathan in *United States v. Wisniewski*, 478 F.2d 274 (2d Cir. 1973):

When a trial culminates in a verdict of guilty the temptation is great for a defendant, armed with hindsight, to claim that his lawyer's strategy in not permitting him to run the cross-examination gauntlet was motivated by a conflict of interest. We do not say that such belated assertions are to be ignored. Each case must, of course, be viewed on its own facts. However, in the absence of objective evidence of corroboratory circumstances, such post-trial claims must be viewed with some suspicion, especially when there has not been submitted a supporting affidavit of the attorney in accordance with the practice recommended in cases where clients belatedly raise a claim of ineffective assistance of counsel. 478 F.2d at 284-5.

* For examples of Nathan's evasive responses to questions, see H. 77, 84, 86-87, 93, 94. In light of the Court's evaluation of Nathan's credibility, it was entirely proper for Judge Bonsal to ignore Nathan's several claims of discontent with his counsel, including his assertion, directly contradicted by Bender and intrinsically improbable at best, that Nathan had never been told of his right to testify and had raised no questions in court for fear that Judge Bonsal would incarcerate him.

Nathan's claim that Bender's alleged conflict was responsible for Nathan's failure to call other witnesses is equally insubstantial. Bender testified that at the time that the defense rested he knew of no witnesses whose testimony would have advanced Nathan's case. (H. 56-57). Nathan asserts that Katzman and Mate should have been called. This claim fails for two reasons. First, Nathan has failed to produce any evidence that either of these witnesses had any testimony helpful to him. Nathan attempted to explain how Katzman's testimony would have helped him in the following exchange:

Q. Mr. Nathan, tell us what it was you thought Mr. Katzman would testify to that would have helped your case?

A. I can't see how he could have harmed me if he told the truth.

Q. What was it that he would have testified to if anything that you thought would help your case?

A. He would have confirmed. I needed—you see, during the trial I kept really—I was very volatile. Lou Bender was absolutely right. I fought with him tooth and nail.

I said, "You have to have confirming witnesses. You have got to bring somebody in to confirm it."

I had never been in a criminal court, and I am 65 years old, in my entire life, and I have never served on a jury, and I said to him—I said, "We are going to lose this case." I said, "If I was on the jury, I would convict. You have got to have some witnesses."

He said, "Don't be your own attorney. If you are going to carry on, they will call the marshal. They will lock you up" and that's all he kept threatening me.

The Court: I think the question is what way do you think that Mr. Katzman would have helped you? You did say he would have helped you.

A. He definitely would have helped me. Sandy Katz on the witness stand said Katzman was in charge and took care of everything. So he would have confirmed it. (H. 80-81)

Of course the record contains no evidence whatever to suggest that Katzman would have testified that he was "in charge" in a manner which would have helped Nathan. Significantly, Nathan's counsel on his § 2255 petition, as to whom there is no claim of conflict of interest, failed to call Katzman at the hearing; and neither Nathan's pretrial affidavits obtained by the Internal Revenue Service nor his pre-trial discussions with Bender contain any indication that he would have taken any of the blame for Nathan's wrongdoing. Indeed, Nathan's admission that he never met Katzman until 1970 or 1971—after the tax returns underlying Counts 1 and 2 were filed—and the absence of any proof that Katzman was aware of Nathan's cashing of checks at hotels strongly indicate that Katzman was not involved in Nathan's crimes. Finally, Katz did not implicate Katzman in his trial testimony. Accordingly Nathan's unsubstantiated claim that Katzman would have been a useful defense witness—let alone that Mr. Bender wrongly chose not to call him—is utterly without merit.

Nathan also claims that Mate should have been called as a defense witness because he would have confirmed Katz' testimony that Katzman was "in complete charge." (H. 87). This claim founders on the fact that Nathan's counsel failed to call Mate at the § 2255 hearing even though Mate was sitting in the courtroom. (H. 30).

Nathan implies that Mate's testimony would have consisted of hearsay statements of Katz. (H. 87). Such "confirming" testimony by Mate would have constituted nothing more than prior consistent statements of Katz which would have been inadmissible. See Federal Rule of Evidence 801(d)(1)(B). Since the record contains no evidence that Mate was associated with Nathan at the same time as Katz, there is no reason to believe that Mate had any admissible testimony favorable to Nathan.

Finally, the record is devoid of any credible evidence that the defense's failure to call these witnesses had anything to do with Bender's representation of Katzman. Clearly, Mate was not Bender's client; and if Katzman had been able to provide any testimony of value to Nathan, the fact that he was represented by Bender would not have prevented him from coming forward.

A careful evaluation of Nathan's claims of prejudice therefore reveals that his § 2255 petition amounts to nothing more than a bitter attack on his trial defense counsels strategic decisions which were based on that attorney's judgment as to how best to protect Nathan's interests. Nathan has been able to raise no substantial claim that these decisions were the product of loyalty to anyone other than himself.

C. Nathan Waived any Objection Based on Bender's Representation of Katzman.

Although Nathan now claims that he did not understand what was told to him in the robing room conference on the first day of trial, an examination of the trial record supports Judge Bonsal's finding that Nathan waived the claim he now presses. In Nathan's presence, Bender made a clear explanation of the fact that he also represented Katzman, that Katzman might be called as a government witness, and that such a situation

created the possibility of a claim of "divided loyalty." (7a). Nathan announced that he had "complete confidence in Mr. Bender and Judge Baltimore. Whatever they do, I am one hundred percent in accord." (8a). After Bender suggested that a further inquiry of Nathan be conducted, Nathan told the Court that he understood the situation. When the Court asked if he agreed to "waive any right that you may have," Nathan responded, "Yes, your Honor." (9a).

Under the circumstances of this case, this colloquy was entirely adequate to record the defendant's understanding of the situation as well as his waiver. The agreement that Judge Baltimore would cross-examine Katzman, if he appeared, eliminated the possibility that Bender might be called upon to cross-examine his own client. With the only significant danger of prejudice from this speculative possibility of a conflict of interest eliminated, the only consent required of Nathan was to Judge Baltimore's, instead of Bender's, cross-examining Katzman, if he testified.* Since this choice was considerably simpler than the judgment which a defendant must make when his attorney represents several co-defendants in a joint trial, such as in *Abraham v. United States*, *supra*, 549 F.2d 236, and *United States v. Carrigan*, *supra*, 543 F.2d 1053, the brief inquiry conducted here by Judge Bonsal was sufficient to ascertain Nathan's knowing waiver of any future objection to the arrangement among counsel.

Finally, the following must be noted. Judge Bonsal presided not only at the hearing on Nathan's § 2255 motion, but also at the trial and at Nathan's voluminous

* The Court could not properly have directed Nathan to obtain new counsel. *United States v. Armedo-Sarmiento*, 524 F.2d 59 (2d Cir. 1975).

post-trial motions. As this Court has noted, when a judge hearing a § 2255 claim "had the advantage of intimate familiarity with the case, born of many pre- and post-trial motions and a long trial where he had the opportunity to observe the witnesses," *United States v. Franzese*, 525 F.2d 25, 32 (2d Cir. 1975), he is entitled to broad discretion in determining whether the movant's claims are of any merit. See also *Machibroda v. United States*, 368 U.S. 487, 495 (1962); *United States v. Loschiavo*, 531 F.2d 659, 666 (2d Cir. 1976). In this context, Judge Bonsal's specific findings that Nathan made a knowing waiver of any rights he might have and that he did not demonstrate any "specific prejudice" resulting from his representation (143a) are not only not "clearly erroneous," see *United States v. Cirillo*, Dkt. No. 77-1045, slip op. 3247, 3249 (2d Cir., April 28, 1977); *Zovluck v. United States*, 448 F.2d 339, 341 (2d Cir. 1971), cert. denied, 405 U.S. 1043 (1972), but were eminently correct.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Constance Morales, being duly sworn,
deposes and says that he is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the

26th day of May 1977 she served a copy of the
within Respondent Appellee's Brief

by placing the same in a properly postpaid franked envelope

addressed: Irving Anolik, Esq.
 225 Broadway
 New York, New York 10007

And deponent further
says s he sealed the said envelope and placed the same in the
mail chute drop for mailing in the United States Courthouse Annex,
One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

26th day of May, 1977

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1979